



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 27, 1995

Mr. Vernon M. Arrell
Commissioner
Texas Rehabilitation Commission
4900 North Lamar Boulevard
Austin, Texas 78751-2399

OR95-713

Dear Mr. Arrell:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33186.

The Texas Rehabilitation Commission (the "commission") received a request for "the personnel and termination records" of the requestor's client. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. You have submitted responsive documents to this office for our review.

Although you did not raise section 552.101 of the Government Code as an exception, this office will raise section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The documents submitted to this office include medical records, access to which is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records may only be released as provided by the MPA. *See* art. 4495b, § 5.08(g), (h), (j).

We also conclude that the commission may withhold the other documents at issue under section 552.103(a) of the Government Code. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. This section applies only if litigation is pending or reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 452 (1986). Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for damages and threatens suit if the damages are not paid. Open Records Decision No. 551 (1990).

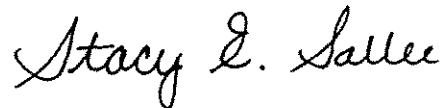
You have submitted a letter dated March 22, 1995, in which the requestor, on behalf of his client, demands payment of damages and threatens suit if damages are not paid. In a subsequent letter, the requestor indicated that, although he hopes litigation would not be necessary to achieve his client's goals, he was preparing for litigation. We conclude that, based on the reasoning in Open Records Decision No. 551 (1990) and these facts, litigation is reasonably anticipated. After reviewing the documents, we also conclude that they are related to the litigation. Therefore, the commission may withhold the remainder of the requested documents under section 552.103(a).¹

¹Section 552.022 of the Government Code provides: "Without limiting the meaning of other sections of this chapter, the following categories of information are public information: . . . (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body, if the information is not otherwise made confidential by law." One of the requested documents, a contract between the requestor's client and the commission, relates "to the receipt or expenditure of public or other funds by a governmental body." However, this office has previously held that the list of documents in section 552.022 is illustrative and does not limit the applicability of the exceptions to disclosure set out in the Government Code. Open Records Decision No. 551 (1990) at 3.

When the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Thus, you may not withhold information already seen by the opposing party. In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We also note that the section 552.103(a) exception is discretionary with the governmental entity asserting the exception. Open Records Decision No. 542 (1992) at 4. The commission may therefore choose to release the non-confidential information that has not been previously been disclosed to the opposing party. Gov't Code § 552.007.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Government Section

SES/RHS/rho

Ref.: ID# 33186

Enclosures: Submitted documents

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